

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

BRADLEES STORES, INC., et al.,

Debtors.

GREENWICH HOLDING CORPORATION,

Appellant,

against

M 47 (LAP)

BRADLEES STORES, INC., et al.,

Appellees.

December 23, 1998  
12:00 noon

Before:

HON. LORETTA A. PRESKA

District Judge

APPEARANCES

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(In open court)

THE COURT: On December 16 I authorized approximately a one-week stay pending Greenwich Holding Corporation's ("Greenwich") appeal of the Bankruptcy Court's order confirming the first amended and modified plan of the reorganization (the "Plan") for Bradlees Stores, Inc. and Affiliates (collectively, "Bradlees" or the "Debtor"). Greenwich requested an expedited appeal and today oral arguments were made on behalf of both parties and additional parties.

Boiling this matter down to its most basic terms, the issue on appeal is whether Section 9.02 of the plan violates Chapter 11 of the Bankruptcy Code. Section 9.02 grants Bradlees the right to assign, assume or reject the unexpired lease in the Union Square property for up to one year after the Plan's Effective Date, both of which terms are defined in the Plan.

Appellant Greenwich supports its appeal on several grounds. First, it argues that after the Effective Date of the Plan, Bradlees is merely a debtor, and therefore it cannot exercise the powers granted to debtors in possession and trustees under sections 365(d)(4) and 1107 of Title 11 of the Bankruptcy Code.

Second, Greenwich contends that nonresidential leases must be assigned, assumed or rejected by the

1 confirmation date or the Effective Date of the Plan, and  
2 that Section 9.02 of the Plan allowing Bradlees to exercise  
3 those rights for a year after the Effective Date violates 11  
4 U.S.C. Section 365(d).

5 Naturally, Bradlees argues that the Bankruptcy  
6 Court's confirmation order should be affirmed. First,  
7 Bradlees argues that assignment, assumption or rejection of  
8 the lease is governed by Section 1123(b)(2) which, it  
9 argues, is not fully subject to Section 365 and that  
10 section's limitation. Second, Bradlees contends that the  
11 phrase "debtor in possession" in Section 365 includes the  
12 debtor, and thus the debtor can exercise Section 365 powers.  
13 Bradlees also argues that the Bankruptcy Court properly  
14 concluded that precedent and "cause" existed for extending  
15 the assumption/rejection powers beyond the confirmation  
16 date.

17 On June 23, 1995, Bradlees, a regional discount  
18 department store chain, filed voluntary petition for Chapter  
19 11 relief under the Bankruptcy Code. On April 13, 1998, the  
20 Debtor filed a proposed plan of reorganization and a related  
21 disclosure statement. An amended plan was filed on  
22 October 2, 1998, and Greenwich presented its objections at a  
23 confirmation hearing held on November 18, 1998.

24 On that date the Bankruptcy Court issued its  
25 confirmation order, stating that the statutory scheme of the

1 Bankruptcy Code permits the debtors to act  
2 "post-confirmation in the fashion that is set forth in  
3 9.02." The Bankruptcy Court also observed that the  
4 reorganization scheme and the value of the Union Square  
5 property are closely linked and "the ability to extract the  
6 value of the property depends on the maintenance of 9.02 of  
7 the Plan."

8 With respect to Section 365, that section of the  
9 Plan that the Bankruptcy Court referred to above, Section  
10 9.02, is the single target of Greenwich's appeal. That  
11 section states:

12 "Reorganized [Bradlees] shall have until the date  
13 that is one year after the occurrence of the Effective Date  
14 (as defined in the Plan) or such later period as the  
15 Bankruptcy Court may grant, to exercise its rights under  
16 sections 363 and 365 of the Bankruptcy Code with respect to  
17 [Bradlees'] unexpired real property lease pursuant to which  
18 [Bradlees] leases the Union Square Property, including,  
19 without limitation, the right to assume, assume and assign,  
20 or reject the lease under which [Bradlees] leases the Union  
21 Square property. The Bankruptcy Court shall retain  
22 jurisdiction with respect to such rights and any issues  
23 related thereto."

24 Plan, Section 9.02. Section 1.65 of the Plan.  
25 sets forth how the Effective Date is determined, and barring

1 extension by Bradlees, it will apparently be February 1,  
2 1999. Accordingly, Bradlees will have until February 1,  
3 2000, to exercise the powers of assumption, assignment or  
4 rejection. The Plan provides that the Union Square lease  
5 and an unrelated lease (the "Yonkers lease") are to secure  
6 \$40 million of notes to be issued by the reorganized  
7 Bradlees to certain creditors. Under the terms of those  
8 notes, reorganized Bradlees will prepay the notes with  
9 proceeds from the sale of the Yonkers lease and Union Square  
10 lease.

11 Greenwich, the landlord of the Union Square  
12 property, currently used as a Bradlees' department store,  
13 contends that Section 9.02 conflicts with Section 365 of the  
14 Bankruptcy Code. That section grants the power to assign,  
15 assume or reject an unexpired lease of nonresidential real  
16 property to trustees. Under 11 U.S.C. Section 1107(a),  
17 those powers are also granted to debtors in possession.  
18 Greenwich argues that only those two entities can exercise  
19 the power of assumption, rejection, etc., of an unexpired  
20 lease of nonresidential real property, and that Bradlees  
21 will not be a trustee or debtor in possession after the  
22 Effective Date.

23 Greenwich argues that Section 365 controls this  
24 issue and that Section 1123(b)(2) is subject to all of the  
25 provisions of Section 365. Generally, Section 1123 governs

1 the contents of a reorganization plan. Subsection  
2 1123(b)(2) states that "a plan may, subject to Section 365  
3 of this title, provide for the assumption, rejection, or  
4 assignment of any executory contract or unexpired lease of  
5 the debtor not previously rejected under such section."  
6 (emphasis added). Bradlees argues that despite the direct  
7 language, Section 365 does not fully govern Section  
8 1123(b)(2).

9 I decline to embrace this interpretation. More  
10 specifically, I decline to adopt Bradlees' construction that  
11 the words "subject to" do not mean "subject to all," (See  
12 Bradlees' Memorandum at 10), or the theory that because  
13 Congress is aware of the phrase "subject to all" and the  
14 absence of such language in Section 1123(b)(2) indicates  
15 that Congress did not intend to import Section 365 fully  
16 into 1123(b)(2), (See Bradlees' Memorandum at 12-13.)  
17 Rather, I find that the plain language of Section 1123(b)(2)  
18 indicates that that section is in fact subject to the  
19 entirety of Section 365.

20 In connection with its reliance on the J.M.  
21 Fields case which I discuss below, Bradlees argues that  
22 Section 1123(b)(2) moves the process further ahead in time,  
23 that is, that it was intended to give the debtor more time  
24 to exercise Section 365 powers. Indeed, Bradlees argues  
25 that the Plan complies with Section 1123(b)(2) and

1 "provi[s] for the assumption, rej[ect]ion, or assignment of  
2 any . . . unexpired lease" by merely stating that it will do  
3 so later within a specified time.

4 Even assuming such intent with respect to Section  
5 1123(b)(2), such general intent cannot under the clear terms  
6 of the statute, that is, that it is subject to Section 365,  
7 trump the very specific widely recognized intent of Section  
8 365(d)(4) to shorten the time within which the debtor in  
9 possession or trustee must exercise its 365(d)(4) rights.

10 Bradlees also contends that preventing the  
11 assumption of unexpired leases after confirmation would  
12 render Section 1123(b)(2) meaningless, since in its view  
13 that section would be swallowed up by Section 365.

14 I disagree. Section 1123(b)(2) is not surplusage  
15 because it provides a procedural alternative to a motion to  
16 assume, assign or reject an unexpired lease prior to  
17 confirmation. Similarly, Bradlees' argument that  
18 Greenwich's interpretation of Section 1123(b)(2), and  
19 specifically the word "provides" is contrary to the plain  
20 meaning of the statute and would force the debtor into an  
21 immediately effective decision under its plan with respect  
22 to its unexpired leases, is unpersuasive.

23 First, Greenwich does not argue that the decision  
24 to reject, assign, etc., must be effective immediately --  
25 only that it must be set out in the Plan so that it can be

1 consider and voted upon. Second, is well recognized  
2 that delaying the assumption/rejection decision until  
3 confirmation can be advantageous to the debtor who seeks to  
4 avoid binding itself to a contract or a lease before it has  
5 devised a "feasible business plan under which it knows  
6 whether it will want the benefits and burdens of each  
7 agreement." 3 Lawrence P. King, ed., Collier on Bankruptcy,  
8 paragraph 365.04[2][a] (15th ed. rev. 1998) (citing Nostas  
9 Associates v. Costich (In Re Klein Sleep Products, Inc.)),  
10 78 F.3d 18, 29 (2d Cir. 1996) (cautioning that the decision  
11 to assume a long term lease should be delayed until  
12 confirmation).

13 Accordingly, I find that Greenwich's  
14 interpretation of Section 1123(b)(2) as requiring a decision  
15 to assume, reject or assign an unexpired nonresidential  
16 lease prior to the Effective Date of the Plan is not  
17 inconsistent with the statute.

18 Next I analyze which parties are authorized under  
19 Chapter 11 of the Bankruptcy Code to exercise Section 365  
20 powers to assume, assign or reject an unexpired  
21 nonresidential lease. Those powers are bestowed on only two  
22 entities, the debtor in possession and the trustee. Here,  
23 no trustee was ever appointed, and Bradlees has served as a  
24 debtor in possession. (See Disclosure Statement, annexed as  
25 Exhibit 3 to the Declaration of Robinson B. Lacy, subscribed

1 to November 30, 1998, at 3.).

2 Following the Effective Date of the Plan,  
3 however, Bradlees will no longer be a debtor in possession.  
4 As Professor King notes: "[u]pon the effectiveness of a  
5 confirmed plan, the Chapter 11 estate is terminated and the  
6 debtor is no longer a Debtor in possession." Collier  
7 1101.01[2] [b] at 1101-04; see *In re Grinstead*, 75 B.P.R. 2,  
8 3 (D. Minn. 1985) ("There is no debtor in possession status  
9 of a debtor post confirmation.")

10 In opposition Bradlees contends that the term  
11 "debtor in possession" includes "debtor." Bradlees relies  
12 on references to sections within Chapter 11, especially  
13 Section 1101(1) which states that "'debtor in possession'  
14 means debtor." That broad definition does not indicate when  
15 the debtor ceases to hold the title of debtor in possession,  
16 and it has been interpreted as intending to refer to "a  
17 debtor who, during the pendency of the case prior to  
18 confirmation, retains property in the fiduciary capacity of  
19 a trustee of the estate." *In re Grinstead*, 75 B.P.R. at 3.

20 Accordingly, I reject Bradlees' interpretation of  
21 "debtor" to extend to the reorganized Bradlees after the  
22 Effective Date of the Plan.

23 Bradlees also argues that the reorganized debtor  
24 has the ability to exercise Section 365 rights when the Plan  
25 so provides. Bradlees' reliance on *Hillis Motors, Inc. v.*

1     Hawai Automobile Dealers Assn, 997 F.2d 581 (9th Cir. 1993)  
2     and In re Parrot Packing Co., 42 B.P.R. 323 (N.D. Ind. 1983)  
3     for this proposition is misplaced. Bradlees cites Hillis  
4     for the proposition that a bankruptcy estate can survive  
5     confirmation and that it remains a debtor in possession. In  
6     Hillis, the court discussed whether, after confirmation, the  
7     debtor's property remained property of the estate. While  
8     the court recognized that confirmation "customarily reverts  
9     the property of the estate in the debtor, it also operates  
10    as a discharge of all dischargeable claims against the  
11    debtor unless the Plan otherwise provides." 997 F.2d at  
12    589. Yet, the plan in Hillis was an anomaly; unambiguously  
13    provided for the preservation of the estate post  
14    confirmation and did not grant Hillis a discharge at that  
15    time. Id. at 588.

16             After confirmation, the debtor was not free to go  
17    about its business without supervision. Rather, the  
18    trustees retained management powers and control over the  
19    business, distribution of the profits remained under strict  
20    control, and the Bankruptcy Court remained involved in the  
21    administration of the estate.

22             The court found that "[w]hile the confirmation of  
23    the Plan emancipates most debtors, Hillis remained a ward of  
24    the court." Id. at 590. Accordingly, the Hillis court  
25    found that the automatic stay continued to apply even after

1 confi tion.

2 Here, the bankruptcy estate will not survive post  
3 confirmation. Rather, the property of the estate will  
4 revest in the reorganized Bradlees when the Plan becomes  
5 effective. See Section 33, Confirmation Order. There will  
6 not be a trustee to supervise Bradlees post confirmation,  
7 and reorganized Bradlees will not, for example, have to seek  
8 court approval for the payment of its various fees, most  
9 importantly, no doubt, its fees to its attorneys. See *id.*  
10 sections 25, 30.

11 Although Bradlees argues that, for example, the  
12 retention of the Bankruptcy Court's jurisdiction over the  
13 details of its future assumption, rejection or assignment of  
14 the Union Square lease is sufficient to bring this case  
15 within *Hillis*, I disagree. Even assuming, as Bradlees  
16 suggests, that it is a matter of degree, that degree is not  
17 reached here. Unlike *Hillis*, Bradlees will not be a ward of  
18 the court under its reorganization plan but will control  
19 property formerly part of the estate and will hopefully make  
20 a robust return to the ranks of retail competition. Thus, I  
21 find *Hillis* to be inapplicable to the case before me.

22 *In re Parrot Packing Co.* is also inapplicable  
23 here. That case stands for the limited proposition that a  
24 Creditors' Committee has standing to seek rejection of the  
25 collective bargaining agreement where the debtor in

1 possion has "unjustifiably" refused to act.

2 In holding that the Creditors' Committee had  
3 standing, the court in Parrot relied on Section 1109(b) of  
4 the Code which provides that "a party in interest . . . may  
5 raise and may appear and be heard on any issue in a case  
6 under this chapter." The Court noted, however, that the  
7 Creditors' Committee motion was made with the approval of  
8 the debtor in possession. Because it is clear that the  
9 debtor in possession could have moved for the relief sought  
10 in that case, and the court did not address the post  
11 confirmation time frame when there is no trustee or debtor  
12 in possession, Parrot Packing does not shed any light on the  
13 current problem.

14 Accordingly, I find that the power to assume,  
15 assign or reject under Section 365(d)(4) may be exercised by  
16 a trustee or a debtor in possession but, under the  
17 circumstances presented here, not by the reorganized debtor.

18 I now consider whether Section 365(d)(4) powers  
19 may be exercised beyond the confirmation date. At the  
20 outset I note that there is significant legislative history  
21 to support Greenwich's argument that nonresidential leases  
22 must be assumed, assigned or rejected by the confirmation  
23 date.

24 Before the Bankruptcy Code was amended in 1984,  
25 Section 365(d)(2) provided that in Chapter 11 the trustee

1 could assume or reject an executory contract or unexpired  
2 lease of the debtor at any time before confirmation of a  
3 plan. See *In re Grayson-Robinson Stores, Inc.*, 227 F.Supp  
4 609 (S.D.N.Y. 1964) (pre-Code case where the court refused  
5 to permit rejection of an executory contract after  
6 confirmation), and the court, on request of any party to the  
7 agreement, could shorten the times to assume or reject.

8 Section 365(d)(4) was added in the 1984  
9 amendments to provide that in all chapters a lease of  
10 nonresidential real property is deemed rejected if the  
11 trustee does not assume or reject it within sixty days after  
12 the order for relief, or within such additional time as the  
13 court fixes, for cause, within such sixty-day period.

14 It is now widely accepted that the purpose of  
15 Section 365(d)(4) was to prevent trustees from taking too  
16 much time in deciding whether to assume unexpired  
17 nonresidential leases. See *Legacy Limited v. Channel Home*  
18 *Centers, Inc. (In re Channel Home Centers, Inc.)* 989 F.2d  
19 682, 686 (3rd Cir. 1993) (collecting cases).

20 Subsection (4) does not refer to a confirmation  
21 date, and Greenwich argues persuasively that it would be  
22 error to construe this omission as supplying authority to  
23 extend the time to assume or reject beyond the confirmation  
24 date or the effective date. The Senate report for the 1984  
25 amendments to the Bankruptcy Code demonstrates that Section

1 3654 (1) (4) was intended to shorten the time for a debtor to  
2 make its election, not extend it.

3 The Report states: "The bill reduces the  
4 severity of these problems [of a trustee's taking an  
5 extended time to assume or reject an unexpired lease] by  
6 imposing a sixty-day limit on the trustee's decision to  
7 assume or reject a nonresidential lease in cases under any  
8 chapter for the code unless the court for cause extends  
9 time. In all but the most complicated reorganization cases,  
10 sixty days should be a sufficient time to make this  
11 determination. Even in large reorganization cases, the  
12 debtor presumably knows his business and understands the  
13 value of his assets well enough to make such decisions. The  
14 debtor should consequently be able to make this  
15 determination shortly after the petition is filed and  
16 certainly within sixty days in all but the most complicated  
17 cases." Sen. Rep. No. 98-70, 11-13.

18 Recognizing that pre-Code case law does not  
19 support the extension of assumption powers and that the 1978  
20 Bankruptcy Code provisions expressly prohibited such  
21 extension, I cannot lightly adopt a construction of the code  
22 that represents a sharp break with its past. In *Dewsnup v.*  
23 *Timm*, 502 U.S. 410 (1992), the Supreme Court admonished  
24 courts construing the Bankruptcy Code that if the language  
25 of the provision creates any uncertainty, the legislative

1 his [REDACTED] should be given controlling weight.

2 In particular: "When Congress amends the  
3 bankruptcy laws, it does not write 'on a clean slate' . . .  
4 Furthermore, this Court has been reluctant to accept  
5 arguments that would interpret the code, however vague the  
6 particular language under consideration may be, to effect a  
7 major change in pre-Code practice that is not the subject of  
8 at least some discussion in the legislative history." *Id.*  
9 at 419.

10 Bradlees cites *In re Gunter Hotel Associates*, 96  
11 B.P.R. 696 (Bankr. W.D. Tex. 1988) as authority for  
12 extension of the assumption/rejection powers. That case  
13 involved a debtor in possession's motion to reject a license  
14 agreement but seeking to delay the effect of such rejection  
15 for some sixty days. The licensor moved to compel  
16 rejection. Both motions were heard at the confirmation  
17 hearing and the Court, relying on bankruptcy Rule 9006(b),  
18 extended for sixty days after confirmation the debtor's  
19 right to assume or reject the license.

20 I find *Gunter* to be rather weak authority given  
21 that Section 365(b)(2), which governed that case, expressly  
22 requires assumption or rejection "at any time before  
23 confirmation of the plan." I also note that the authority  
24 on which *Gunter* relies deals with preservation of the  
25 jurisdiction of the Bankruptcy Court to consider the

1 debt pre-confirmation motions reject unexpired leases  
2 or executory contracts, not the reorganized company's future  
3 exercise of 365(d)(4) rights. See *In re J.M. Fields, Inc.*,  
4 26 B.P.R. 852, 853 (Bankruptcy S.D.N.Y. 1983). Thus,  
5 neither Gunter nor Fields supports Bradlees' position here.

6 Given the absence of any clear congressional  
7 intent to extend the assumption/rejection powers regarding  
8 unexpired leases past the confirmation or effective date, I  
9 will not break with bankruptcy precedent before the 1984  
10 amendments which indicates that such extension would not be  
11 permitted.

12 Because I have determined that the Bankruptcy  
13 Court should not have extended the assumption/rejection  
14 powers for an unexpired nonresidential lease, I do not reach  
15 the issue of cause.

16 In ruling today I do not ignore the many  
17 complicating factors in this case. In particular, I note  
18 the three and a half years Bradlees spent in Chapter 11, the  
19 significant and substantial efforts it and the other parties  
20 have spent in developing a viable reorganization plan, the  
21 difficulty of finding a tenant to assume the lease for the  
22 Union Square property, and the importance of that property  
23 for Bradlees' future welfare as an ongoing company. Indeed,  
24 we have all agreed here today that the issue is not the  
25 economic viability of this scheme; rather, the legality.

1                    Accordingly, because Sect 9.02 of the Plan is  
2 inconsistent with Section 365(d)(4) of the code, the  
3 confirmation order is reversed and the matter is remanded to  
4 the Bankruptcy Court.

5                    Is there anything further today, counsel? Thank  
6 you for your most informative arguments. I'm sorry to have  
7 brought you here so soon before the holiday.

8                    (Proceedings adjourned)  
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